

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2004-42-C - ORDER NO. 2004-470
OCTOBER 6, 2004

IN RE: Joint Petition for Arbitration of New South)	ORDER RULING ON
Communications Corp., NuVox)	TWO MOTIONS
Communications, Inc., KMC Telecom V,)	
Inc., KMC Telecom III LLC, and Xspedius)	
(Affiliates) of an Interconnection Agreement)	
with BellSouth Telecommunications, Inc.)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on two Motions. The first Motion is a Motion to Sever or to Adopt Procedural Requirements filed by BellSouth Telecommunications, Inc. (BellSouth). The second Motion is a Joint Motion for Waiver of Time Restriction, filed on behalf of NewSouth, NuVox, KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius (Affiliates) (the Joint Movants).

I. Motion to Sever: BellSouth moves this Commission for an Order severing the present proceedings into several parts, on the grounds that Section 252 of the Telecommunications Act of 1996 (the Act) contemplates that arbitrations will be between a single Competitive Local Exchange Carrier (CLEC) and a single incumbent. BellSouth quotes Section 252(b)(4)(B) of the Act in support of its Motion, which provides that “the State Commission may require the petitioning party and the responding party to provide such information as may be necessary for the State Commission to reach a decision on unresolved issues.” Nevertheless, as stated by BellSouth the present arbitration was filed jointly by four unaffiliated CLECs, i.e., NewSouth, KMC, NuVox, and Expedius.

BellSouth asserts that the Act does not contemplate this type of joint filing, although BellSouth also admits that such a joint filing is not expressly prohibited by the Act. BellSouth further admits that there may well be circumstances in which it would be appropriate for the Commission to consolidate properly filed, separate arbitrations into a single proceeding.

Further, BellSouth asserts that a proper Motion should contain sufficient facts to allow the Commission to determine whether the requested consolidation would be in the interest of administrative economy, and would otherwise result in a more efficient resolution of the issues than would separate proceedings.

BellSouth further notes that to address these infirmities, the Commission should either sever this matter into four separate proceedings, or adopt procedural requirements to ensure that efficiency and administrative economy are served rather than hindered. First, BellSouth asserts that, if the Joint Movants continue to proceed jointly, then their positions must be the same on each issue. Second, according to BellSouth, the Commission should restrict the CLECs to cross-examining each BellSouth witness only once. The theory is that, because there are four Petitioners, they may be entitled to cross-examine each witness four times. BellSouth states, that if this is the case, there is little to be gained by having a joint proceeding. BellSouth makes additional suggestions.

The Joint Movants have filed a Response to BellSouth's Motion alleging that the Motion should be dismissed and that there is nothing improper about the Joint Petition for arbitration. The Joint Movants state that the Joint Petition was filed as a joint petition in order to maximize limited resources, efficiency, and bargaining power. The Joint

Movants state that the efficiency and benefits that will result from this multi-party arbitration will be shared by the Commission, the Commission Staff and all parties, including BellSouth. The Joint Movants have stated that the testimony that will be filed will be consolidated and integrated joint testimony.

We have considered both the Motion, the Response, and related materials, and have concluded that the Motion to Sever should be denied. We agree with the Joint Movants that efficiency and benefits will result to all parties and the Commission by continuing the hearing as a joint proceeding. We note that this consolidated hearing is consistent with the intent of 26 S.C. Code Ann. Regs. 103-864, which notes that two or more formal proceedings may be consolidated for hearing which involve a similar question of law or fact, and where rights of the parties or the public interest will not be prejudiced by such procedure. We hold that, even though the original Petition was filed jointly, this proceeding meets the tests stated in the Regulation, in that there are similar questions of law and/or fact involving all the Joint Movants.

We do agree with BellSouth, however, that certain procedural safeguards should be invoked in the proceeding. First, the Joint Movants shall have a single position statement on each issue. Second, the Joint Movants shall cross-examine each BellSouth witness only one time per issue. We believe that these safeguards will allow for a fairer hearing procedurally.

II. Motion for Waiver of Time Restriction: The second Motion to be disposed of is a Joint Motion for Waiver of Time Restriction, filed by the Joint Movants in this case. We would note that BellSouth consents to and supports the relief requested in the

Motion. The Joint Motion for Waiver seeks a limited waiver of application of the nine month time frame established in Section 252(a)(4)(C) of the Act for Commission resolution of the issues presented in this proceeding. The Joint Movants state that compliance with the nine month time frame would produce unusual hardship and difficulty for all parties involved and for the Commission, and, therefore, according to the Joint Movants, the granting of a waiver would clearly be in the public interest.

In support of the Joint Motion, the Joint Movants stated that the Joint Petition for Arbitration was filed on February 11, 2004. BellSouth provided to the Joint Movants requests for negotiation of a new interconnection agreement. Negotiations began on September 6, 2003. The window for filing a formal request for arbitration under Section 252 of the Act opened on January 17, 2004 and closed on February 11, 2004. Section 252(a)(4)(C) provides that the Commission must resolve each issue set forth in the Joint Petition as well as those raised in BellSouth's response within nine months of the request for a commencement of negotiations. Given the September 6, 2003 commencement date, the statutory deadline under Section 252(a)(4)(C) would be on or about June 6, 2004. The Joint Motion seeks a 3-month extension of that deadline to on or about September 6, 2004.

The Joint Movants note correctly that this Commission has traditionally adhered to the nine month window. They also state that in the event a state commission fails to act within the nine month window, either party may request that the Federal Communications Commission (FCC) preempt the state's jurisdiction and decide the pending matters. Also according to the Joint Movants, a waiver of the nine-month

window would be consistent with South Carolina law, which requires that the Commission resolve all issues within nine months of the filing of the petition for arbitration. *See* S.C. Code Ann. Section 58-9-280(D).

Also, the Joint Movants assert that, based upon the experience of the parties in other states, it is fairly common practice across the BellSouth region and elsewhere for parties, including CLECs, BellSouth and state commission staffs, to voluntarily waive application of the nine-month deadline set forth in Section 252(a)(4)(C). The Joint Movants state that waiver is appropriate in circumstances where no party opposes its application, since the nine-month deadline exists for the benefit of the parties to the arbitration, to provide assurance that the arbitration will be decided within a definite time frame. The Joint Movants stated that where, as in this case, the parties are comfortable with working beyond such a deadline, no party would be prejudiced by grant of a waiver, and in light of certain circumstances, waiver is clearly in the public interest. The Joint Movants cite the pending Triennial Review Order proceeding, the BellSouth-Level 3 arbitration proceeding, and a Verizon South arbitration as examples of major proceedings that are pending before the Commission at this time. The Joint Movants also point out a number of non-telephone proceedings pending before the Commission.

The Joint Movants and BellSouth agree that they will neither (1) request the FCC to act to preempt the Commission's jurisdiction over this matter prior to the expiration of the extended deadline nor (2) use the Commission's decision not to act within the original nine-month timeframe as grounds for appeal of the Commission's resolution of the issues in this proceeding.

We have examined the matter and hold that the Joint Motion should be granted and the nine-month timeframe extended to September 6, 2004. We grant this extension on a one time basis, in light of several special circumstances. First, the Commission has been reconstituted following the March 3 elections. Further, there are a number of lengthy and complex cases already pending hearing and decision scheduled between March 16, 2004 and the first part of June, such as the Chem-Nuclear proceeding, the Universal Service Fund proceeding, the TRO proceedings, and Wireline to Wireless Number Portability.

Having thus decided the Motions listed herein, we also instruct Staff to bring this matter back before the Commission to establish the actual scheduling dates consistent with this Motion.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

/s/
Randy Mitchell, Chairman

ATTEST:

/s/
G. O'Neal Hamilton, Vice Chairman

(SEAL)